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Ó Fathaigh, R.; Voorhoof, D.

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## Strasbourg Observers

# Journalist and editor's conviction for incitement to religious hatred violated Article 10

🕒 December 19, 2019   👤 Guest Blogger   📁 Freedom of Expression, *Tagiyev and Huseynov v. Azerbaijan*

By *Ronan Ó Fathaigh and Dirk Voorhoof*

In *Tagiyev and Huseynov v. Azerbaijan* (<http://hudoc.echr.coe.int/eng?i=001-198705>), the European Court of Human Rights unanimously held that the conviction and imprisonment of Azerbaijani journalist Rafiq Nazir oglu Tagiye, and editor Samir Sadagat oglu Huseynov, for incitement to religious hatred, violated their right to freedom of expression under Article 10 ECHR. Both had spent over a year in an Azerbaijan prison, and shockingly, following his release, Tagiyev was stabbed to death in an attack in Baku while his case was pending before the European Court. Tagiyev's wife has continued the proceedings over her husband's conviction and imprisonment, proceedings that took more than 11 years before the European Court. Mrs. Tagiyev also has a separate case pending over her husband's killing, claiming that the Azerbaijani government failed to protect his right to life, and that he was targeted over his journalistic activities ([here \(http://hudoc.echr.coe.int/eng?i=001-174273\)](http://hudoc.echr.coe.int/eng?i=001-174273)).

### Facts

The case began in early November 2006, when Tagiyev wrote an article headlined 'Europe and us', which was published in the *Sanat Gazeti* newspaper, where Huseynov was editor-in-chief. The article was part of a series on 'East-West studies', which discussed the role of religion in society, and the influence of Iran in Azerbaijan. The article contained comments on Islam, including that 'Morality in Islam is a juggling act; its humanism is not convincing'; 'in comparison with Jesus Christ, the father of war fatwas the Prophet Muhammad is simply a frightful creature'; 'at best, Islam would advance in Europe with tiny demographic steps. And maybe there would be a country in which Islam would be represented by a few individuals or terrorists living incognito', and the 'Eastern philosopher' acts 'as a clown'. The article also criticised Iran, commenting that '[t]he Azerbaijani Turk even remains European within the strict Shiite-Islamic regime of Iran. Oppressions and any kind of persecution, or nationalist assimilation attempts, bring no success to Persian chauvinism'. These statements led to public protests against Tagiyev, as well as criticism by various Azerbaijani and Iranian religious groups. In particular, a religious leader of Iran issued a religious fatwa calling for Tagiyev's death (see also [here \(https://www.nytimes.com/2006/12/24/world/europe/24azerb.html\)](https://www.nytimes.com/2006/12/24/world/europe/24azerb.html) and [here \(http://news.bbc.co.uk/2/hi/middle\\_east/6158195.stm\)](http://news.bbc.co.uk/2/hi/middle_east/6158195.stm)).

Criminal proceedings were initiated against Tagiyev and Huseynov, under Article 283 of the Criminal Code, which criminalises 'incitement to religious hatred', and carries a possible four-year prison sentence. The investigator ordered a 'forensic linguistic and Islamic assessment' of the article,

which was carried out by the religious expertise department at the State Committee for Work with Religious Organisations. The department's report referred to the remarks above, and concluded that the article 'seeks to spread propaganda of hatred and hostility against Islam', and that there were 'sufficient grounds to conclude the existence of elements of actions leading to incitement to religious hatred and hostility'.

Subsequently, the Nasimi District Court ordered Tagiyev and Huseynov's pre-trial detention. In May 2007, the Sabayil District Court convicted Tagiyev of incitement to religious hatred over the article; and Huseynov was also convicted of incitement to religious hatred for having authorised publication. The District Court relied on the conclusions of the religious expertise department's report, 'without making any legal assessment or giving further explanation'. Tagiyev was given a three-year prison sentence, and Huseynov a four-year prison sentence. Both appealed their convictions, claiming a violation of Article 10 ECHR. But both the Court of Appeal and the Supreme Court rejected their appeals.

In December 2007, Tagiyev and Huseynov were released from prison, following a presidential pardon decree, having spent more than 13 months in detention. Both made applications to the European Court in 2008, claiming their convictions and imprisonment violated their right to freedom of expression. Tragically, in 2011, Tagiyev was stabbed as he returned home by an unknown person, and died four days later in hospital. As mentioned above, Tagiyev's wife has a separate case pending against Azerbaijan over the killing.

## Judgment

In its judgment of 5 December 2019, the Court accepted that the convictions were 'prescribed by law', as Article 283 of the Criminal Code was 'accessible and foreseeable'; and pursued the legitimate aims of 'protection of the rights of others' and 'prevention of disorder'. The main question for the Court was whether the convictions were 'necessary in a democratic society'. In this regard, the Court reiterated the principle from its seminal 1979 judgment *Sunday Times v. UK* (<http://hudoc.echr.coe.int/eng?i=001-57584>), that its supervisory function is 'not limited' to ascertaining whether national authorities exercised their discretion 'reasonably, carefully and in good faith'. Instead, the Court must determine whether the reasons adduced by the authorities were 'relevant and sufficient', whether the measures taken were 'proportionate'; and the Court must 'satisfy itself' that the national authorities, 'basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10' (see also more recently: the Grand Chamber in *Magyar Helsinki Bizottság v. Hungary* (<http://hudoc.echr.coe.int/eng?i=001-167828>), para. 187; and *Baka v. Hungary* (<http://hudoc.echr.coe.int/eng?i=001-163113>), para. 158).

First, the Court noted that although Tagiyev's article contained several remarks about Islam, the article 'mainly dealt with the comparison between Western and Eastern values, expressing the author's ideas about the role of religion in the formation of those values'. As such, the article was not to be examined 'only' in the context of religious beliefs, but 'also in the context of a debate on a matter of public interest'. The Court reiterated the principle that under Article 10, there is 'little scope' for restrictions on political speech and expression on matters of public interest, citing the Grand Chamber in *Baka v. Hungary* (<http://hudoc.echr.coe.int/eng?i=001-163113>).

The Court then examined the impugned remarks 'characterised by the domestic courts as incitement to religious hatred', and noted that some of the remarks 'may' be seen by 'certain religious people' as an 'abusive attack on the Prophet of Islam and Muslims living in Europe, capable of causing religious hatred'. Crucially, however, the Court held that it 'cannot' accept the reasons provided by the Azerbaijan courts as 'relevant and sufficient' for imposing the convictions. The Court held that the domestic courts had 'failed' to carry out any assessment of the remarks by examining them 'within the general context of the article', and had failed to assess the 'author's intention', and the 'public

interest of the matter discussed'. Notably, the Court reiterated the principle from *Paraskevopoulos v. Greece* (<https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2264184/11%22%5D%7D>), that national courts 'are required' to consider an article's 'context' and 'public interest', and 'intention of the author'.

Further, the Court criticised the domestic courts for (a) 'confin[ing] themselves' to 'reiterating the conclusions of a forensic report, without giving any explanation as to why the particular remarks contained in the article constituted incitement to religious hatred'; and (b) 'fail[ing] to examine the report and merely endorsed its conclusions'. The Court was of the opinion that the forensic report 'went far beyond' mere language and religious issues, and 'provided, in essence, a legal characterisation of the impugned remarks'. The Court found this 'unacceptable', and stressed 'all legal matters must be resolved exclusively by the courts'. Moreover the domestic courts did not strike a right balance between the rights protected under Articles 9 and 10 ECHR.

Finally, the Court thought it 'necessary' to draw attention to the severity of the penalties imposed, namely criminal proceedings, three- and four-year prison sentences, and detention for more than 13 months. The Court held that the case did not present 'any justification' for such 'severe sanctions', which were capable of producing a 'chilling effect on the exercise of freedom of expression in Azerbaijan', and 'dissuading the press from openly discussing matters relating to religion, its role in society or other matters of public interest'. The Court concluded that Tagiyev and Huseynov's criminal convictions were 'disproportionate', and not 'necessary in a democratic society', in violation of Article 10 ECHR.

## Comment

The most important aspect of the *Tagiyev and Huseynov* judgment is undoubtedly the human tragedy. It involved Rafiq Tagiyev and Samir Huseynov, who were both subjected to criminal prosecution, pre-trial detention, conviction, and 13 months in prison, for publication of an article on a matter of public interest: discussing the role of religion in society and endorsing the perspective of humanism and respect for human rights in Europe. It also involved Rafiq's wife Maila Tagiyeva, who after the assassination of her husband continued the proceedings, and continues proceedings against Azerbaijan over her husband's killing. Indeed, a number of NGOs recently submitted an alert to the Council of Europe's platform on the safety of journalists, over 'continued impunity' for the murder of Rafiq Tagiyev ([here \(https://www.coe.int/en/web/media-freedom/detail-alert?p\\_p\\_id=sojdashboard\\_WAR\\_coesojportlet&p\\_p\\_lifecycle=0&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_count=1&sojdashboard\\_WAR\\_coesojportlet\\_alertId=30337836\)](https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-4&p_p_col_count=1&sojdashboard_WAR_coesojportlet_alertId=30337836)) and [here \(https://www.coe.int/en/web/human-rights-channel/end-impunity-for-crimes-against-journalists\)](https://www.coe.int/en/web/human-rights-channel/end-impunity-for-crimes-against-journalists)). It is hoped that the European Court will soon deliver its judgment on the killing, and the subsequent (lack of) investigation mainly from the perspective of Article 2 ECHR (right to life) and that effective steps will be taken in Azerbaijan to protect journalists' life, their physical integrity, their right to respect for private and family life and freedom of expression under Articles 2, 3, 8 and 10 ECHR (see *Emin Huseynov v. Azerbaijan* (<http://hudoc.echr.coe.int/eng?i=001-154161>); *Uzeyir Jafarov v. Azerbaijan* (<http://hudoc.echr.coe.int/eng?i=001-150649>); *Huseynova v. Azerbaijan* (<http://hudoc.echr.coe.int/eng?i=001-172661>) and *Khadija Ismayilova v. Azerbaijan* (<http://hudoc.echr.coe.int/eng?i=001-188993>). See also *Gongadze v. Ukraine* (<http://hudoc.echr.coe.int/eng?i=001-70853>); *Dink v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-100383>) and *Mazepa a.o. v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-184660>)).

The unanimous judgment in *Tagiyev and Huseynov* raises some important issues. First, it clearly and unambiguously applies the principle that when considering incitement to hatred, national courts are required to assess (a) the context, (b) the author's intention, and (c) the public interest of the matter discussed, in combination with other relevant elements. The Court found that the domestic courts did not pertinently justify that the article incited to hatred and religious intolerance as they only 'examined the impugned remarks detached from the general context and content of the article,

without assessing the author's intention, the public interest of the matter discussed and other relevant elements'. Thus, the judgment in *Tagiyev and Huseynov* confirms the European Court's approach that radical statements using a degree of provocation or exaggeration and allegedly inciting to hatred or violence can only be interfered with under the strict conditions of 'relevant and sufficient reasons' justifying a proportionate interference. In other recent cases the Court not only emphasised the importance of the context, the content and intention, but also 'other relevant elements' such as the impact or the (lack of) 'clear and imminent danger' of the alleged incitement to hatred or violence (see *Gül and Others v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-99186>) (para. 42); *Kılıç and Eren v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-107591>) (para. 29); *Mart ao v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-191750>) (para. 31-32); *Koç v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-198800>) (para. 41); *Mariya Alekhina a.o. (Pussy Riot) v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-184666>) (see blog here (<https://strasbourgobservers.com/2018/09/11/pussy-riot-the-right-to-protest-and-to-criticise-the-president-and-the-patriarch-mariya-alekhina-and-others-v-russia/>)); *Stomakhin v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-182731>) (see blog here (<https://strasbourgobservers.com/2018/06/12/no-overbroad-suppression-of-extremist-opinions-and-hate-speech/>)); and *Savva Terentyev v. Russia* (<http://hudoc.echr.coe.int/eng?i=001-185307>) (see blog here (<https://strasbourgobservers.com/2018/10/09/savva-terentyev-v-russia-criminal-conviction-for-inciting-hatred-against-the-police-violated-a-bloggers-freedom-of-expression/>))). The UN Special Rapporteur on freedom of expression also considers these elements 'essential' when determining whether an expression constitutes incitement to hatred: 'real and imminent danger' of violence; 'intent of the speaker' to incite discrimination, hostility or violence', and careful consideration of the 'context' ((here ([https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/67/357](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/67/357))) and quoted in *Mariya Alekhina a.o. v. Russia*, para. 106, here (<http://hudoc.echr.coe.int/eng?i=001-184666>)).

Second, the Court seems to have moved away from its controversial, and heavily-criticised judgment, in *E.S. v. Austria* (<http://hudoc.echr.coe.int/eng?i=001-187188>) (see blog here (<https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/>)), where it found *no* violation of Article 10 ECHR over a conviction for 'disparaging religious doctrines' under Austria's Criminal Code (an expert in the field of Islamic doctrine holding training seminars for the Austrian Freedom Party had been convicted for suggesting Mohammad had 'paedophilic tendencies'). Indeed, the Fifth Section of the Court, which delivered *Tagiyev and Huseynov*, had also delivered the earlier *E.S.* judgment. While leaving a wide margin of appreciation – as the domestic authorities were considered to be 'in a better position to evaluate which statements were likely to disturb the religious peace in their country' – the European Court was satisfied with the argumentation by the domestic courts that the applicant's statements about Mohammed 'had been capable of arousing justified indignation, namely that they had not been made in an objective manner aiming at contributing to a debate of public interest'. The Court also emphasised the authorities' positive obligations under Article 9 ECHR to secure the peaceful co-existence of religious and non-religious groups by ensuring 'an atmosphere of mutual tolerance' and it agreed with the domestic courts' findings that provocative statements capable of hurting the feelings of the followers of a religion could be conceived as 'a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society'. In its conclusion in *E.S.*, the Court emphasised that the statements at issue were 'likely to arouse justified indignation in Muslims' and were not 'not phrased in a neutral manner aimed at being an objective contribution to a public debate'. On these grounds, the Fifth Section accepted the domestic courts findings that the statements went beyond the permissible limits of 'an objective debate', were capable of 'stirring up prejudice and putting at risk religious peace', and 'contained elements of incitement to religious intolerance'.

Now in *Tagiyev and Huseynov*, the Fifth Section, under the same President – Judge Angelika Nußberger – did not follow the domestic courts and government's reasoning: it reduced the margin of appreciation, as indeed the impugned press article was to be situated in 'the context of the freedom of press' and 'political expression', a domain where the authorities enjoy only a limited

margin of appreciation in assessing whether a pressing social need exists for interfering with the right to freedom of expression. And unlike in *E.S.*, the Court found that the offending article 'should not be examined only in the context of a matter relating to religious beliefs, but also in the context of a debate on a matter of public interest, namely the role of a religion in society and its role in the development of society'. Neither did the Court impose the condition that the wordings need to be phrased 'in a neutral manner', as an 'objective contribution' to that public debate. Also, in contrast with *E.S.*, the Court in *Tagiyev and Huseynov* found it *not* decisive that the article at issue could be seen by 'certain religious people as an abusive attack on the Prophet of Islam and Muslims living in Europe, capable of causing religious hatred', as it is for the national authorities to carry out a comprehensive assessment of the impugned remarks, putting forward relevant and sufficient reasons for justifying the interference. And although the Court in *Tagiyev and Huseynov*, as in *E.S.*, referred to the positive obligations of the authorities under Article 9, it did not reproduce the wording in *E.S.* that provocative statements 'capable of hurting the feelings of the followers of a religion' could be conceived as 'a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society'.

It is also noticeable that in *E.S.*, the Court held that the '(potential) effects' of the statements 'depend to a certain degree', on the 'situation' in the country where the statements were made at the time (para. 50). The Court however provided no authority for this principle, cited no case law, and nowhere explained what such supposed 'situations' were. But notably, in *Tagiyev and Huseynov*, the Fifth Section omitted any reference to this principle, or *E.S.*'s paragraph 50. However, in another case of 'disparaging religious doctrines' (*Otto Preminger Institute v. Austria* (<http://hudoc.echr.coe.int/eng?i=001-57897>)) the Court justified the interference with freedom of expression referring to the religion of the (overwhelming) majority of the population in the region of Tirol where an alleged blasphemous movie was seized by the authorities, preventing its public showing in a cinema. The Court stated that it could not 'disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner'. In *Tagiyev and Huseynov* the Court did not consider it relevant to refer to the situation that the Islam religion is the religion of an overwhelming majority in Azerbaijan. Certainly the Court did not consider it sufficient that the Azerbaijani authorities had acted to ensure religious peace or to prevent that 'some people' could have felt offended in their religious beliefs (see also *Aydin Tatlav v. Turkey* (<http://hudoc.echr.coe.int/eng?i=001-75276>), para. 28).

In *Tagiyev and Huseynov* the crucial point for the Court is that the domestic authorities gave no explanation as to why particular remarks or statements contained in the Tagiyev's article constituted 'incitement to religious hatred and hostility'. The fact that some people, a religious minority or even a religious majority can be offended in their religious beliefs cannot be a sufficient argument to interfere with the right to freedom of expression as part of a public debate on matters of religion. The crucial issue is whether the offensive or insulting statements about a religion incite to hatred or violence (see also the Report of the Venice Commission (CDL-AD(2008)026) on this issue, finding '[t]hat it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component' and General Comment no. 34 on freedom of opinion and freedom of expression of the Human Rights Committee, para. 48, both quoted in *E.S. v. Austria* (<http://hudoc.echr.coe.int/eng?i=001-187188>), para. 28 and 30). By finding a violation of Article 10 ECHR, the judgment in *Tagiyev and Huseynov* continues the Court's line of case law on incitement to hatred and violence – *Gül and Others*; *Kılıç and Eren*; *Mart and Others*; *Koç*; *Mariya Alekhina and Others*; *Stomakhin and Savva Terentyev* – which is aligning Article 10 ECHR principles with UN freedom of expression standards. This line of case law reflects the concerns earlier expressed by the Court in *Stomakhin and Savva Terentyev* that it is 'vitaly important that the domestic authorities adopt a cautious approach in determining the scope of "hate speech"

crimes and strictly construe the relevant legal provisions in order to avoid excessive interference under the guise of action taken against “hate speech” and ‘to avoid a situation where the State’s discretion to prosecute for such offences becomes too broad and potentially subject to abuse through selective enforcement’.

Finally, it must be recognised that also in *Tagiyev and Huseynov*, the Court’s starting point is the possibility – and even the necessity – of interferences with the right to freedom of expression based on the religious rights of others, considering that:

‘[w]here such expressions go beyond the limits of a critical denial of other people’s religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures’.

The Court also reminded that ‘tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society’, and that it ‘may be considered necessary in democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify violence or hatred based on intolerance’. However, the Court reiterated a major qualification: ‘a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance’. As such, the test for incitement to hatred or religious intolerance is key, and it is expected that the Court’s strict test under *Tagiyev and Huseynov* will lead to the continued full Article 10 ECHR protection for public-interest and controversial expression concerning religion, in particular in the European countries that still have laws criminalising blasphemy or religious insult (see [here \(https://www.france24.com/en/20181031-blasphemy-middle-east-asia-bibi-europe-law-religion-ireland\)](https://www.france24.com/en/20181031-blasphemy-middle-east-asia-bibi-europe-law-religion-ireland)).

2 thoughts on “**Journalist and editor’s conviction for incitement to religious hatred violated Article 10**”